



Ohio Consumers' Counsel

*Residential
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December 16, 2002

Michael Powell, Chairman
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

**Re: Triennial Review of Unbundled Network Elements
WCB Docket No. 01-338, ex parte communication**

Dear Chairman Powell and Commissioners:

On November 12, 2002, at its annual meeting in Chicago, the National Association of State Utility Consumer Advocates ("NASUCA") unanimously passed a resolution in support of continuing the requirement that incumbent local exchange carriers ("ILECs") lease the unbundled network element platform ("UNE-P") to competitors.¹ As President of NASUCA, I am pleased to submit NASUCA's resolution ("Resolution") for the record of this proceeding.

As set forth in the Resolution and as discussed more fully below, the availability of the UNE-P has led to a significant portion of the residential and small business local exchange competition currently experienced by the consumers represented by NASUCA members. Any movement to make the UNE-P unavailable, or to limit its availability, will harm the nascent mass market competition now being seen in many areas throughout the nation.²

¹ NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

² In a 12/11/2002 *ex parte*, USTA asserts (at 2) that failure to follow the ILEC/RBOC line will "send this industry, as well as the supplier industry, into an abyss from which it will take decades to recover." This exaggerates the role the FCC's unbundling policies have played in the industry's current distress and the role supporting the incumbents can play in the industry recovery. See also CWA 12/11/2002 *ex parte*.

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The Resolution also indicates that examination of the key questions for this proceeding -- whether competitors are “impaired” without access to the UNE-P and other UNEs, and whether access to a proprietary UNE is “necessary” for that competition -- must be done on a state-by-state and market-by-market basis. Thus this Commission should set the standard for impairment, the individual states should determine whether any specific UNE should no longer be made available.³ As discussed below, even though some competitive local exchange carriers (“CLECs”) use their own switches to serve business customers, other CLECs are impaired in providing service to residential and small business customers without access to the UNE-P (which includes local switching).

The record also shows the difficulties and costs of transitioning away from the UNE-P, which further indicates that provision of local service to residential and small business customers is impaired without the UNE-P. This is true for CLECs that have residential service in their business plan; it is certainly too much to expect CLECs that do not intend to serve residential customers suddenly to be attracted to that market, especially if the UNE-P disappears. If, indeed, there is to be a move away from UNE-P, the move must be cautious and be under specific conditions, which the states should determine.

The remainder of this letter touches on the important issues in this proceeding. This is done by reference to the Resolution, to comments filed by NASUCA members and to some of the dozens of other parties’ *ex partes* that have been presented to the Commission in the last 90 days.⁴ The Resolution and this letter are especially important as a clear articulation of the interests of the Nation’s residential and small business telecommunications consumers.

The Importance of UNE-P

The UNE-P is the combination of the local loop, local switching and interoffice transport that is integral to ILEC provision of local service. See Resolution. These are UNEs that are ordinarily combined in the ILECs’ networks.⁵

CLECs’ use of the UNE-P is responsible for a significant portion of the current level of local telephone service competition for residential and small business customers. See Resolution.⁶

³ See NARUC 11/20/2002 *ex parte*.

⁴ Joint Comments were filed on April 5, 2002 by the Pennsylvania Office of Consumer Advocate, the Ohio Consumers’ Counsel, the New Hampshire Office of Consumer Advocate and the Maryland Office of People’s Counsel (“Joint Advocate Comments”). The Texas Office of Public Utility Counsel filed comments with the Consumer Federation of America, Consumers Union and the Center for Digital Democracy.

⁵ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 395, 142 L.Ed.2d 834, 119 S. Ct. 721 (1999).

⁶ See also Joint Advocate Comments at 9-11.

For example, in Ohio a recent affidavit submitted by Ameritech Ohio asserts that of the 260,000 CLEC residential lines in Ameritech Ohio territory, 240,000 are served through the UNE-P.⁷ And UNE-P usage is growing: SBC asserts that over the past year, UNE-P lines in service have doubled.⁸

Key to the importance of UNE-P is its flexibility, allowing and requiring the CLEC to sell enough service over the leased facilities to make competition profitable and feasible.⁹ CompTel's 11/18/2002 *ex parte* (at 1-5) succinctly refutes the RBOC argument that use of the UNE-P is nothing more than cut-rate resale.

AT&T has stated that "UNE-P is today essential for competition in the provision of local telecommunications services to residential and small business customers...."¹⁰ NASUCA agrees.¹¹

What happens if the Commission eliminates UNE-P?

If the UNE-P is eliminated, the impact on residential competition will be devastating. To use the previously-cited example, most if not all of the 92% of residential competition in Ameritech Ohio territory that is served over UNE-P is likely to disappear.¹²

CLECs serve these residential customers under current conditions. There is no substantial likelihood that these CLECs will either desire to or be able to serve these 240,000 Ohio residential customers under any of the other possible means of competitive service available under the Act.

These customers certainly will not be served through resale. In Ameritech Ohio territory, less than 20,000 access lines are served via resale.¹³ That number has remained stagnant since 1990, contrasted to the growth in UNE-P.¹⁴

⁷ *In the Matter of the Joint Application of SBC Communications, Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control*, PUCO Case No. 98-1082-TP-AMT, Affidavit of Deborah Heritage (filed September 25, 2002) at 4 (available at [http://dis.puc.state.oh.us/dis.nsf/0/28A9681D3864FB4D85256994005FBCF4?OpenDocument&target="MainBody"](http://dis.puc.state.oh.us/dis.nsf/0/28A9681D3864FB4D85256994005FBCF4?OpenDocument&target=)) ("Heritage Affidavit").

⁸ SBC 11/1/2002 *ex parte* at 3.

⁹ The RBOCs certainly profit from their local service. See AT&T 10/29/2002 *ex parte*.

¹⁰ AT&T 11/7/2002 *ex parte* at 1.

¹¹ This is especially true because, as AT&T notes (11/26/2002 *ex parte* at 1-2), UNE-P has brought competition to urban, suburban and rural customers of ILECs like SBC.

¹² A similar result will ensue if the prices of UNEs are substantially increased, or if the ILECs are allowed to charge "market-based" rates for these bottleneck facilities.

¹³ Heritage Affidavit at 4.

¹⁴ The ILECs' plans for a transition to resale (see, e.g., Qwest 10/30/2002 *ex parte* at 3; Verizon 10/16/2002 *ex parte* at 17) assume that a long-term business case can be made for resale service.

If ILECs are no longer required to give access to unbundled local switching, then CLECs will have to depend upon the manual “hot cut” process to connect their switches to the ILECs’ loops. As discussed below, the intrusion of this process into customer switching significantly impairs CLECs’ ability to provide service to residential customers.

Finally, as if the lack of margins in resale and the inefficiency of hot cuts were not enough of a deterrent to competition, local exchange service provided exclusively over CLEC’s facilities is also problematic. For example, the one possibility for facilities-based local competition in many areas is cable telephony, which is hardly capable of absorbing the current customer base served over UNE-P.¹⁵

Deleting the UNE-P from the list of unbundled network elements -- whether by removing local switching from the unbundling requirements or some other means -- would thus leave residential customers with no choice other than to return to the ILEC. This would significantly undermine, if not eliminate, the nascent competition through which competitors are at last making inroads into the ILECs’ century-old monopoly power.

CLECs would be impaired without access to the ILEC’s switch, even though other CLECs have their own switches.

47 U.S.C. § 251(d)(2)(B) sets the standard for the Commission’s determination of which network elements should be made available to competitors. A network element will be made available if “lack of access to that element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.”¹⁶

The record here shows clearly that CLECs serving residential customers are impaired without access to the seamless UNE-P. The 12/11/2002 CompTel/PACE *ex parte* and WorldCom’s 11/7/2002 and 10/23/2002 *ex partes* demonstrate the unnecessary and unreasonable costs that are imposed when the CLEC can use only the ILEC’s loops and must invest in its own switches.¹⁷

The existence of CLEC switches is fundamental to the ILECs’ assertions that local switching should not be unbundled.¹⁸ If local switching is not required to be unbundled, then access to the combination of local switching, local loop and transport that is the UNE-P would no longer have to be made at TELRIC rates. ILECs say then that they would give access at “market-based”

¹⁵ See WorldCom 11/27/2002 *Ex parte*.

¹⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (November 5, 1999) (“UNE Remand Order”), ¶ 51.

¹⁷ See also AT&T 11/26/2002 *ex parte* at 2-6; WorldCom 11/18/2002 *ex parte*; McLeod 11/15/2002 *ex parte* at “UNE-L Line Migrations.” WorldCom’s 10/23/2002 *ex parte* (at 3-5) shows how the CLEC impairment is different from the disadvantage suffered by any new entrant into a market.

¹⁸ Elimination of the interoffice transport UNE would also lead to elimination of the UNE-P. Cbeyond’s 11/22/2002 *ex parte* addresses interoffice transport.

rates.¹⁹ The ILECs' dominance of this market would make such rates those of a virtual monopoly.

The 1996 Act does not require CLECs to unbundle their switches and/or loops; that duty rests only with the incumbent. Compare 47 U.S.C. § 251(b) to § 251(c)(3). Thus if the ILEC is not required to give access to its switches at reasonable rates, then each CLEC will have to build its own switch or be at the mercy of excess capacity on other CLECs' switches in order to provide *any* local service.

In this analysis, it is helpful to differentiate service to residential and small business customers from service to larger business customers.²⁰ Providing service to large customers is a customized effort, and the process of switching carriers for large customers is equally customized.

By contrast, providing service to mass-market residential and small business customers requires speed and uniformity in order to work. The "hot cut" process, requiring physical intervention to disconnect a customer's loop from the ILEC's switch and reconnect it to the CLEC's switch, provides neither speed nor uniformity.²¹ As noted by WorldCom, the New York Public Service Commission recognized that at current volumes, it would take Verizon over 11 years to switch all the current UNE-P customers in its territory to UNE loops.²²

Indeed, the decision of a CLEC to build a switch to serve residential customers assumes an ability to win those customers over, one-by-one. In this unsettled business climate, it is not surprising that few CLECs have chosen such a route. The substantial customer acquisition and migration costs also impair residential service by CLECs that have built their switches to serve business customers, assuming that those CLECs even have a business plan that includes residential customers.

The Commission has held that economies of scale favor the incumbents, and that the absence of such economies impairs CLECs.²³ This principle was upheld by the Supreme Court in *Verizon*.²⁴ Under the Act, such economies themselves justify making portions of the ILEC neighborhood, including combinations like the UNE-P, available to CLECs.

¹⁹ See, e.g., Qwest 10/30/2002 *ex parte* at 8.

²⁰ See Joint Advocates Comments at 2, 15-17.

²¹ See Resolution; WorldCom 11/18/2002 *ex parte*; WorldCom 11/6/2002 *ex parte* at 7; Network Conceptions 10/25/2002 *ex parte* at 18; SBC 11/1/2002 *ex parte*, "SBC Hot Cuts" at 5; Qwest 10/30/2002 *ex parte* at 5. See also WorldCom 10/23/2002 *ex parte* at 8-11.

²² WorldCom 11/6/2002 *ex parte* at 9, 10.

²³ *UNE Remand Order*, ¶ 76.

²⁴ *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 1661, 152 L. Ed.2d 701 (2002).

Under these conditions, competition for residential and small business customers is clearly impaired in the absence of the UNE-P. The Commission should continue to direct the ILECs to make the UNE-P available.²⁵

The myth of the impact of UNEs on the RBOCs and the industry

The Regional Bell Operating Companies (“RBOCs”) have forcefully advocated all conceivable reductions in the number and level of available UNEs, particularly the UNE-P.²⁶ In this proceeding, they have argued that the UNE-P harms wireline carriers, manufacturers and intermodal competitors.²⁷ In the public arena, however, the thrust of the RBOCs’ argument is the supposed harm to the RBOCs themselves. Yet this asserted harm is contradicted by the RBOCs’ financials as reported to Wall Street and as noted by AT&T in its October 2 and October 29 *ex partes*.²⁸

The harm supposedly comes from TELRIC rates -- particularly for the UNE-P -- being set below cost.²⁹ **Yet no RBOC has successfully appealed a state-set UNE rate on that basis.**³⁰ Of course, the RBOCs appealed the very concept of TELRIC and lost resoundingly in the United States Supreme Court in *Verizon*.³¹ The RBOCs now attempt to reargue at the FCC the issues that they lost in the states.³²

The RBOCs also assert that the Commission’s unbundling rules deter investment in the network. This argument has two prongs: First, that the availability of the UNE-P allows CLECs to avoid investing in their own facilities, and second, that unbundling “disincent” the ILECs from investing in *their* own facilities.

²⁵ As discussed below, if there is any limitation of the UNE-P, it should be directed by a state commission based on a clear evidentiary record.

²⁶ See, e.g., SBC 11/1/2002 *ex parte* at 2.

²⁷ *Id.*

²⁸ The RBOCs also claim that the Commission’s unbundling rules cause industry-wide harms. For example, SBC’s 11/1/2002 *ex parte* (at 14) blames Nortel’s and Tellabs October 21, 2002 poor financial performance for the past year on the Commission’s rules. Perhaps UNE-P is also responsible for El Niño.

²⁹ See, e.g., “Panel Speakers at NARUC See Links Between Investment, UNE-Ps,” *State Telephone Regulation Report* (November 22, 2002) at 1, 3; “Qwest’s Notebaert Tells NARUC Curing Telecom’s Malaise May Be Painful,” *State Telephone Regulation Report* (November 22, 2002) at 4.

³⁰ Network Conceptions 10/25/2002 *ex parte* (at 7) puts forth the plausible proposition that the RBOCs’ operations are inefficient. See also *id.* at 10.

³¹ 122 S. Ct. at 1665-1681.

³² See, e.g., Qwest 10/28/2002 *Ex parte*. SBC Ameritech Ohio has requested that UNE-P rates be doubled. *In the Matter of the Review of Ameritech Ohio’s TELRIC Costs for Unbundled Network Elements*, PUCO Case No. 02-1280-TP-UNC, Application (filed May 31, 2002) (available at [http://dis.puc.state.oh.us/dis.nsf/0/2237D6D260FCE42985256BCA004C5BD8?OpenDocument&target="MainBody](http://dis.puc.state.oh.us/dis.nsf/0/2237D6D260FCE42985256BCA004C5BD8?OpenDocument&target=)”). SBC Ameritech Michigan and SBC Ameritech Illinois also made similar requests to their respective state commissions. See “SBC pulls request to hike competitor fees,” *Chicago Tribune* (October 16, 2002).

As to the first argument, nothing in the Act compels competitive service to be provided only over CLEC facilities; 47 U.S.C. § 251 allows for competition via resale, UNEs and CLEC facilities, with no explicit or implicit favoritism to any one of the three. The RBOCs' claim that CLEC-built and -owned facilities are the be-all, end-all of competition is defeated by the RBOCs' own action as they compete in the long distance market, thanks to 47 U.S.C. § 271: The RBOCs compete using others' facilities rather than building their own networks.³³

The RBOCs argue against the UNE-P because there has not been to date a rapid conversion of CLEC UNE-Ps to CLEC switches.³⁴ Yet the Act contains no requirement for such a conversion, rapid or not. If the conversion is technically feasible and economic, it will happen.³⁵

On the issue of the level of ILEC investment where unbundling is required, there is first and foremost an issue of causation: Does the availability of UNEs disincent the RBOCs from making investments, or are there other reasons for a retrenchment in investment? Indeed, might RBOCs have slowed their investments because they want to create an argument for getting rid of UNEs (and TELRIC)? Numerous studies (some recently presented) call the RBOCs' proposition into question.³⁶ Indeed, the Supreme Court rejected this argument in *Verizon*, 122 S.Ct. at 1675-76 and n.33.³⁷

The Commission must continue unbundling to promote broadband competition

Without access to the bundle of UNE-P, competitive local exchange service for residential and small business would be impaired. Equally, without access to UNEs, competition for the bundle of services that is wireline broadband Internet access would be impaired. The Covad 11/15/2002 *ex parte* (e.g., at 5) addresses these issues. Covad also shows (at 8, 15, 16) that the intermodal substitutes provided by cable modems, wireless and satellite are insufficient to eliminate the unbundling requirements for wireline. As set out in NASUCA's April 22, 2002 Comments and later Reply Comments in Docket 01-337, reducing competitors' access to a key mode of broadband access will not enhance competition in the broadband internet access market.

³³ See AT&T 10/29/2002 *ex parte* at 2.

³⁴ See, e.g., SBC 11/1/2002 *ex parte* at 6, referring to the New York experience.

³⁵ Verizon alone among the RBOCs has asserted -- on a number of occasions -- that some carriers have begun to convert customers from their own switches to UNE-P. See Verizon 12/4/002, 11/15/2002, 11/14/2002, 11/7/2002, 10/16/2002 *ex partes*. Verizon has never provided any support for its statement.

³⁶ See Hassert/Kotlikoff 11/15/2002 *ex parte*; Z-Tel 11/7/2002 *ex parte*; AT&T 10/11/2002 *ex parte*. The issue of whether the UNE-P per se disincent CLEC investment more than other UNEs (see Verizon 11/18/2002 *ex parte*) reads into the statute a provision that a UNE which otherwise meets the impairment standard can be eliminated because it does not create enough investment.

³⁷ In its 11/25/2002 *ex parte* (at 10), TIA implies that merely removing the requirement that RBOCs provide access to "new, last-mile broadband facilities" (emphasis in original) "will help return the flow of capital into the [telecom] sector...." after describing the industry's dire straits in detail. *Id.* at 1-9. TIA fails to establish any causal relationship between the Commission's unbundling policies and the industry's financial difficulties.

The Commission should not preempt the fact-based assessments of the states

SBC asserts that the Commission should not only remove unbundled local switching (“ULS”) from the national UNE list, but should forbid the states from adding ULS back to a state-specific list.³⁸ SBC’s reasons for this are set forth on page 15 of the 11/1/2002 *ex parte*. These arguments go too far: Under SBC’s hypothesis, any independent state action having to do with competition should be forbidden. In an 11/19/2002 *ex parte* (at 1), Qwest charges that

those with a vested interest in the status quo are increasing their calls for a transfer of decision-making authority from the Commission to the states concerning what network elements should be subject to unbundling requirements. They claim that, when the Commission excludes a UNE from the unbundling list for failure to meet the federal impairment standard of 47 U.S.C. § 251(d)(2), states should be permitted to reach the opposite conclusion and place that UNE back on the list under either state or federal law. Some go even further and suggest that the Commission is incapable of applying section 251(d)(2) on its own and that it should therefore delegate much of that responsibility to the states, albeit with some general guidance that undoubtedly would be of little practical import.

The Commission cannot ignore that Qwest’s complaints about state regulators does not signal respect for federal regulators.³⁹ State regulators’ decisions in this area are, for the most part, based on a closer examination of the local facts, including through oral hearings where witnesses are examined under oath, than is available to this Commission.

NASUCA’s Resolution holds that the states are both directed to and best situated to make the fact-intensive judgments necessary to determine whether competitors are not impaired without access to specific UNEs or the UNE-P.⁴⁰ NASUCA supports the positions set forth in NARUC’s 11/20/2002 *ex parte*.

Transition principles

The record in this proceeding supports maintaining the UNE-P. Contrary to that record, the ILECs seek to have the Commission remove the UNE-P from the UNE list. BellSouth, for example, would allow a six-month transition period for the embedded base of UNE-P customers.⁴¹ Qwest estimates that all existing UNE-Ps could be converted to either resale or unbundled loops (“UNE-L”) within seven months.⁴² Neither BellSouth nor Qwest explains how transitioning all the UNE-P customers in its or other ILECs’ territories to UNE-L plus “market-

³⁸ SBC 11/1/2002 *ex parte* at 2.

³⁹ See also Qwest 10/28/2002 *ex parte*.

⁴⁰ See also Joint Advocates Comments at 4-5; WorldCom 10/23/2002 *ex parte* at 7-8.

⁴¹ BellSouth 11/18/2002 *ex parte* at 1.

⁴² Qwest 11/14/2002 *ex parte* at 14.

priced switching” within six or seven months would be technically possible. SBC, on the other hand, would allow a two-year transitional wholesale offering for residential customers -- not priced at TELRIC.⁴³ CLECs would have one year of the two years to transition to this wholesale offering.⁴⁴ At the end of the two years, the wholesale offering could be withdrawn.

Clearly, if the Commission allows elimination of the UNE-P, the process must be undertaken on a market-by-market basis, by the individual states. The transition must be on a technically feasible schedule -- far longer than the six months, seven months or one year proposed by the RBOCs.⁴⁵ There must also be technical capabilities to make the transition seamless -- *for each customer*.⁴⁶ These processes must be subject to “enforceable performance metrics and standards....”⁴⁷

Conclusion

A final -- and, we believe, new to this docket -- counter to the RBOC/ILEC arguments can be found in Network Conceptions LLC’s 10/25/2002 *ex parte* (at 3, 14): the notion that the offering of UNE-P is the best available catalyst for RBOC competitiveness and is one way to achieve the RBOC-to-RBOC competition so lacking to this point. If the ILECs were to abandon their position on UNE-P and instead spend their considerable time and resources preparing to and actually entering each others’ markets, the cause of local exchange service competition for residential and small business customers would be advanced significantly.

Residential and small business customers have a real stake in the outcome of this proceeding. We were promised the benefits of the 1996 Act; we have only lately seen some of those benefits; and we remain most susceptible ILEC monopoly power or market dominance. The Commission must preserve the mechanism by which residential and small business customers have thus far seen competition: the UNE-P.

⁴³ SBC 11/19/2002 *ex parte* at 5.

⁴⁴ *Id.* WorldCom’s 11/25/2002 *ex parte* points out that SBC provides no justification for its proposed \$26 monthly wholesale rate. AT&T’s 11/21/2002 *ex parte* shows that -- contrary to SBC’s claims (see SBC 11/19/2002 *ex parte* at 8) -- SBC’s proposal would kill residential competition. SBC’s 12/11/2002 *ex parte*, while attempting to show errors in AT&T’s calculations, really shows only that under SBC’s transition plan competition would be strictly limited to “high-end” customers -- a strategy for which SBC roundly condemns AT&T. *Id.* at 5.

⁴⁵ See Broadview/Talk America/Eschelon 12/ 12/2002 *ex parte*.

⁴⁶ See WorldCom 11/20/2002 *ex parte*.

⁴⁷ See ALTS 11/26/2002 *ex parte*.

NASUCA appreciates the Commission's concern for the interests of residential and small business customers.

Yours truly,

A handwritten signature in black ink, appearing to read "Rob Tongren", with a large, sweeping loop at the end.

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